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# IN THE
# COURT OF APPEALS OF INDIANA

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| CHARLES R. ACHOR, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 89A01-0603-CR-108 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0512-FD-135

**October 6, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellant-defendant Charles R. Achor appeals his conviction for Attempted Theft,[1] a class D felony, claiming insufficiency of the evidence. Specifically, Achor argues that his conviction cannot stand because the evidence established that he abandoned his intent to commit the offense. Achor also argues that the three-year sentence was inappropriate when considering the nature of the offense and his character. Concluding that the evidence was sufficient and that Achor was properly sentenced, we affirm the judgment of the trial court.

## FACTS

On December 7, 2005, Achor entered a Richmond Wal-Mart store and placed a cordless drill and a hand grinder in a shopping cart. Achor began to weave in and out of the aisles, alerting the suspicions of Wal-Mart employees. At some point, Achor removed the drill's outer packaging and hid the packing and security tag in a mop bucket. He then placed the drill in a Wal-Mart bag, tied the ends of the bag together, and placed it on the bottom of the shopping cart.

Thereafter, Achor put the grinder on a shelf, walked into the lawn and garden area, and approached a gate leading to the parking lot where his wife was waiting in their vehicle. No cash registers were in that particular area of the store. After discovering that the gate was locked, Achor re-entered the main part of the store and stood in the pharmacy line. Achor made eye contact with a Wal-Mart loss prevention employee, Chad Bond, who recognized Achor from a recent shoplifting incident. As a result of that incident, both Achor and his wife had been instructed not to return to the store.

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[1] Ind. Code § 35-43-4-2(a); Ind. Code § 35-41-5-1.

As Achor attempted to leave, Bond approached Achor and identified himself. Achor denied any wrongdoing and said, "I did not take anything from the store, and I have nothing on me." Tr. p. 186. Bond told Achor that he had been observing him and that there was video evidence of Achor's activities. Although Bond agreed to show Achor the videotape, Achor ran toward the exit. Bond ultimately stopped Achor and contacted the police. When the police arrived, Achor was arrested and charged with attempted theft.

Following a jury trial that concluded on February 8, 2006, Achor was found guilty as charged. At a sentencing hearing on March 8, 2006, the trial court found the following aggravating circumstances: (1) Achor recently violated the conditions of probation, parole, pardon, community corrections placement, or pretrial release; and (2) Achor's criminal history. The trial court specifically stated that it was placing significant weight on Achor's lengthy criminal history. The trial court also identified Achor's substance abuse and the hardship that imprisonment would place on Achor's dependents as mitigating factors. However, the trial court assigned very little mitigating weight to those circumstances. Finding that the aggravators outweighed the mitigators, the trial court sentenced Achor to three years of incarceration. He now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Achor first argues that the evidence was insufficient to support his conviction. Specifically, Achor contends that the State failed to show that he took a substantial step toward the commission of theft, inasmuch as the evidence allegedly established that he had

abandoned any attempt toward committing the offense.

In resolving this issue, we first note that when reviewing a claim of insufficient evidence, we will neither reweigh the evidence nor judge the credibility of witnesses. Smith v. State, 660 N.E.2d 357, 362-63 (Ind. Ct. App. 1996). We will examine the evidence in the light most favorable to the judgment and allow all reasonable inferences that may be drawn from it. Clark v. State, 695 N.E.2d 999, 1002 (Ind. Ct. App. 1998).

To convict Achor of attempted theft, the State was required to show that Achor knowingly or intentionally took a substantial step toward exerting unauthorized control over property of another person with the intent to deprive the other person of any part of its value or use. I.C. §§ 35-43-4-2, 35-41-5-1. We further observe that a substantial step in the context of an attempt "is any overt act beyond mere preparation and in furtherance of intent to commit an offense." Childers v. State, 813 N.E.2d 432, 435 (Ind. Ct. App. 2004).

Here, Achor claims that his actions of removing the packaging from the drill case and placing it in a Wal-Mart bag merely amounted to "a trivial, preliminary step" towards the commission of theft. Appellant's Br. p. 4. Notwithstanding these contentions, the evidence established that Achor entered the store and removed the outer packaging of the drill containing the item's bar code. Tr. p. 266. Achor also removed the security tag and placed the packaging into a mop bucket. Id. at 267. Achor then placed the drill in a Wal-Mart bag, tied the ends of the bag together, and placed the item on the bottom of his shopping cart. Id. Finally, Achor fled the store after an exchange with a security guard who he had previously encountered.

In our view, this evidence established that Achor went beyond "mere preparation" to commit the offense. Other than Achor's self-serving statement that he was not going to steal the drill, the only element missing from actual theft was the act of leaving the store with the item. Hence, the jury could draw the reasonable inference from the evidence that Achor attempted to steal the drill.

Notwithstanding the above, Achor maintains that his conviction must be set aside because the evidence showed that he had "abandoned" his attempt to commit the offense "when he voluntarily left his cart containing the merchandise and moved to exit the store." Appellant's Br. p. 5. In order to validly assert the defense of abandonment, it must be shown that the defendant's renunciation of the criminal plan occurred both voluntarily and before the crime was completed. Vaughn v. State, 426 N.E.2d 113, 115 (Ind. Ct. App. 1981). Here, the evidence showed that Achor fled the store only when he realized that Wal-Mart security personnel were watching him. Hence, we cannot say that Achor's actions amounted to a voluntary renunciation of his attempt to commit the offense. Rather, it is apparent that Achor fled the store to avoid apprehension. Thus, Achor's argument fails, and we conclude that the evidence was sufficient to support his conviction.

## II. Sentencing

Achor next argues that his sentence was inappropriate. Specifically, Achor contends that imposition of the three-year maximum sentence was not warranted when considering the nature of the offense and the fact that he had only one prior felony conviction.

Before addressing the merits of Achor's claims, we observe that on April 25, 2005, the

General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. Inasmuch as Achor committed the instant offense on December 7, 2005, we conduct our review of his sentence under the "new" sentencing scheme.

> As a panel of this court recently observed in Creekmore v. State:
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> > Under our post-Blakely statutory scheme, the trial court may impose any sentence that is authorized by statute and permissible under the Indiana constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Banks v. State, 841 N.E.2d 654 (Ind. Ct. App. 2006) (May, J., concurring in result), trans. denied. I.C. § 35-38-1-7.1(d), as amended by P.L. 71-2005, Sec 3.

No. 43A03-0509-CR-466, slip op. at 10 (Ind. Ct. App. Sept. 7, 2006) (emphasis added). That said, the trial court was statutorily authorized to order Achor's three-year term of imprisonment pursuant to Indiana Code section 35-50-2-7.[2] Our review of his sentence is now confined to an analysis under Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." See also Buggs v. State, 844 N.E.2d 195 (Ind. Ct. App. 2006), trans. denied. In accordance with this review, we note that we may consider, among other things, aggravating and mitigating factors found—or not found—by the trial court. See, e.g.,

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[2] This statute provides in relevant part that "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)."

Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same). Although appellate review of sentences must give due consideration to the trial court's sentencing determination because of its special expertise in making sentencing decisions, Appellate Rule 7(B) gives a reviewing court the authority to revise sentences when certain broad conditions are satisfied. Buggs, 844 N.E.2d at 195.

When considering the nature of the offense in this case, Achor and his wife were told not to return to the Richmond Wal-Mart because of a recent shoplifting episode. Tr. p. 222. Hence, in addition to attempting to steal from the store, Achor also committed criminal trespass when he did so. See Fleck v. State, 508 N.E.2d 539, 540 (Ind. 1987) (recognizing that individuals who are banned from a store and later re-enter the premises are guilty of criminal trespass). As to the character of the offender, the record shows that Achor has committed nineteen prior criminal offenses. Tr. p. 315. He has averaged at least two convictions or probation violations every year since he reached adulthood. Appellant's App. p. 87-91. Contrary to Achor's argument that he has accumulated only one prior felony conviction, four of those convictions were for theft and an additional theft charge was ultimately reduced to a conversion conviction. Id. Moreover, Achor was free on bond when he committed the instant offense, and even though he was sentenced to less than the

maximum sentence in three previous cases, he violated the conditions of probation at least five times in each of those instances. Id. at 320.

In sum, Achor has enjoyed the benefits of more lenient sentences in the past with no improvement in his conduct. He has received fully and partially-suspended sentences as well as probation. Also, Achor has received concurrent sentences, been fined, and been afforded the opportunity to enter a diversion program. None of these sentencing alternatives and lenient measures have resulted in Achor's rehabilitation. In light of these circumstances, we cannot say that Achor's three-year sentence is inappropriate and in need of revision.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.